Supreme Court, U.S.
FILED

981849 APR 20 1999

OFFICE OF THE CLERK

No.

In The

Supreme Court of the United States

OCTOBER TERM, 1998

MARK MCCLAIN,

Petitioner

v.

RICHARD C. SCHARRER et, al.,

Respondent(s).

On Petition For Writ of Certiorari to the
Southern District Court of Ohio, Western division, Western District

PETITION FOR WRIT OF CERTIORARI

Mark McClain
Petitioner,
577 Gramont Ave.
Dayton, Ohio 45407
(937) 263-7705

2488

QUESTIONS PRESENTED

1. Did the District Court improperly enter Respondent's motion for directed verdict and whether that Motion was entered contrary to law?

2. Did the District Court violate Petitioner's rights under the due process clause to the Fourteenth Amendment of the United States Constitution by dismissing the case without affording Petitioner the proper opportunity to present evidence to his claims?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the United States Court of Appeals for the District of Columbia are Mark McClain, Richard C. Scharrer and Pickrel, Schaeffer & Ebeling.

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Appendix B - ORDER by The United States Court Of Appeals For The Sixth Circuit Dated December 21, 1998 (Page 5a)

Appendix C - DECISION Of The Supreme Court Of Ohio Dated April 1, 1999 (Page 9a)

Petitioner herein respectfully prays that a writ of certiorari issue to review the judgment of the United States District Court for the Southern District of Ohio entered on July 15, 1998.

OPINIONS BELOW

The decision of the United States District Court is unreported, (98-4208 July 15, 1998). (2a) The final order of the Court of appeals is also unreported, (98-00182 6th Cir. February 26, 1999).

BASIS FOR JURISDICTION

The final Judgment of the District Court was entered on July 15, 1998. The court of appeals had jurisdiction over this matter pursuant to 28 U.S.C. section 1291. This Court has jurisdiction to review the judgment of the court of appeals pursuant to 28 U.S.C. Section 1254 (1).

CONSTITUTIONAL PROVISION(S) INVOLVED

Pursuant to Rule 14(f) of the Supreme Court Rules, the citation of relevant constitutional provision(s) involved are listed here, while the pertinent text is set out in the appendix to this petition at (page 1a) Fourteenth Amendments to the United States Constitution.
U.S. Const. amend XIV, Section 1.

STATEMENT OF THE CASE

On June 6, 1998 Pursuant to Federal Rules of Civil Procedure 12 (b)(6) Respondent Scharrer filed a motion to dismiss that was based in part on the asserted-failure to state a claim upon which relief can be granted, on June 10, 1998 Respondent, Pickrel, Schaeffer & Ebeling filed a motion to dismiss incorporating such arguments and allegations in Respondent Scharrer's motion to dismiss. The district court as required by Federal Rules of Civil Procedure 12(b)(6) treated the motion to dismiss as one for summary Judgment as provided under Federal Rules of Civil Procedure 56.

On June 19, 1998 the Petitioner moved for summary judgment Pursuant to Rule 56(a) of the Federal Rules of Civil Procedure, the Respondents were absence of any plausible bases to conclude their reason for not acting contrarily under color of State law was worthy of belief, there were no genuine issue as to any material fact, and that no reasonable jury could return a verdict for which it would be in favor of the Respondents, Petitioner was entitled to judgment for the relief requested in the complaint under Federal Rules of Civil Procedure 50(b) as a matter of law, for such "State Action" under Title 42 U.S.C. Section 1983.

On July 14, 1998 the district court granted the enlargement of time for the Respondent Pickrel, Schaeffer & Ebeling, Petitioner's untimeliness of the appeal was the result of Petitioner's reliance on the erroneous extension of time for filing motions for reconsideration, or filing material pertinent to Respondent(s) motion under rule 56 . *Thompson v. I. N. S.*, 375 U.S. 384 (1964). see *Harris Lines v. Cherry Meat Packers*, 371 U.S. 215 (1962).

Pursuant to Federal Rules of Civil Procedure 12(b)(6) "All parties shall be given reasonable opportunity to present all material pertinent to such a motion by rule 56 ". Under rule 56 summary Judgment cannot be granted unless there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. The genuine issue of material fact that remained was to whether the Petitioner was in fact deprived of a constitutionally protected property interest, thus in contrast Respondent's motion for directed verdict under rule 50(a) was improperly entered, Federal rules of Civil procedure 50(a) allows a party to move for a direct verdict at the close of the other party's evidence, Petitioner's motion under rule 50(b) should not have been dismissed. On July 15, 1998 the district court dismissed the case for failure to state a claim and entered the judgment in favor of the Respondents and against the Petitioner.

On December 21, 1998 in the 6th Circuit Court of Appeals the matter was before the court upon consideration of the Petitioner's response to the court's October19, 1998 order directing him to show cause why his appeal should not be dismissed for lack of jurisdiction on the basis of a late notice of appeal and on the basis that the notice of appeal did not designate the court to which the appeal was being taken. Petitioner responded stating that he appealed the district court's order of October 19, and that the appeal should not be dismissed for informality of form or title, arguing the merits.

Counsel for Richard C. Scharrer filed a motion on October 26, 1998 asking the count to dismiss the frivolous appeal on the basis that the notice of appeal was late because it was not filed within 30 days of the decision or within 10 days of the order denying relief from the judgment. Counsel then moved for sanctions for the preparation of the motion to dismiss. It appeared before the court that the final judgment of the district court was entered July 15, 1998 any time-tolling motions was required to be filed within ten days of the entry of the judgment, no motion regarding the judgment was entered within that period, the motion for reconsideration filed on September 4, 1998 was late, and that the appeal period was not tolled. Fed. R. App. P. 4 (a)(4).

Petitioner filed his notice of appeal on October 5, 1998 from the judgment filed on June 19, 1998. The court held the notice of appeal was late. Pursuant to Fed. R. App. P. 4(a) and 26(a). and moreover the notice of appeal was defective in that it failed to designate the name of the court to which the appeal was taken as required by Fed. R App. P.3(c). *United States v. Webb*, 157 F.3d 451, 453 (6th Cir 1998) (per curiam).

The failure of Petitioner to timely file his notice of appeal deprived the appellate court of jurisdiction. The court held that the compliance with Fed. R. App. P.4 (a) is mandatory and jurisdictional prerequisite which the court could neither waive nor extend. *Baker v. Raulie*, 879 F.2d 1396,1398 (6th Cir. 1989) (per curiam) and Fed. R. App. P.26(b) specifically provides that the court may not enlarge the time for filing a notice of appeal. The Court then ordered that the appeal be dismissed for lack of jurisdiction, the Respondent's motion for sanctions was denied. On December 30, 1998 Petitioner file for rehearing of the Court's order of December 21, 1998 on February 26, 1999 the court held it did not misapprehend or overlook any point of law or fact when it issued its order, the Petition for Rehearing was Denied.

On April 1, 1999 in the Supreme Court of Ohio, the matter was before the Court upon consideration of the Petitioner's Petition for writ of certiorari explaining why the case involved a substantial Constitutional question, the Supreme Court of Ohio rejected the Petitioner's Petition on the grounds that the Petitioner did not file the necessary documents required to perfect the appeal in the Supreme Court within the 45 days from the entry of the Judgment being appealed. S. Ct. Prac.R. II, Section 2(A)(1). and S. Ct. Prac. R. III, Section 1(D).

The cause presented critical issues pertaining to a substantial Constitutional question regarding the Petitioner's rights under the Fourteenth Amendment of the United States Constitution, whether any State shall deprive any person of life, liberty, or property, without due process of law nor deny to any person within it's jurisdiction the equal protection of the laws. The case involved a substantial Constitutional question of the district Court's decision effecting the Petitioner's rights under the Ohio Constitution, Article 1, Section 1.16. And under the due process and equal protection clauses of the U.S. Const. amend. XIV, Section 1. The case was appealed from the district court on the grounds that the Respondent's motion for a directed verdict was improperly entered.

The Petitioner concluded by arguing that the district court's decision invaded the Petitioner's rights under the Ohio Constitution, Article 1, Section 1.16. Which provides: " Every person, for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay." and that such an invasion violates Petitioner's Constitutional rights under the due process and equal protection clauses of the U.S. Const. amend. XIV, Section 1.

REASONS FOR GRANTING THE PETITION

I. Judical Review

I. Certiorari should be granted to consider whether the Final Judgment should be reversed because the decision was made without the procedure required by law.

The district court did not afford Petitioner the opportunity to present evidence to his claims or have them considered by the court which would have been fair or at least as directed under rule 50(b). Petitioner was faultless for such enlargement of time, and was simply "shut out" from the proceedings.

II. The Court should grant certiorari to consider whether the District Court's rulings were contrary to the law.

The district court's ruling violates Petitioner's Constitutional right under the due process clauses of the U.S. Const. amend. XIV, Section 1. Which provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." See *Webb v. Texas*, 409 U.S. 95 (1972). *Gilmore v. Taylor*, 508 U.S. 333 (1993) *Pennsylvania v.Ritchie* 480 U.S. 39 (1987) *United States v. Owens*, 484 U.S. 554 (1988) *Green v. Georgia*, 442 U.S. 95 (1979) *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406 (9th Cir. 1995) *Pilon v.Bordenkircher*, 444 U.S. 1 (1979).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Mark McClain
577 Gramont Ave.
Dayton, Ohio 45407
(937) 263-7705

Petitioner.

APPENDIX

U.S. Const. amend. XIV, Section 1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." reference to (page 1,6,7)

Mark McClain, Plaintiff-Appellant v. Richard C. Scharrer; Pickrel, Shaeffer & Ebeling Defendants -Appellees. United States Court of Appeals for the Sixth Circuit No. 98-4208 2/26/1999 ORDER by KENNEDY AND BATCHELDER CIRCUIT JUDGES; WISEMAN, DISTRICT JUDGE. denying Petition for rehearing. reference to (page 5)

Mark McClain, Plaintiff -vs- Richard C. Scharrer, et al.,, defendants. United States District Court for the Southern District of Ohio Western Division at Dayton. case No. C-3-98-182 7/15/1998 JUDGMENT IN A CIVIL CASE : by Mag. JUDGE MICHAEL MERZ reference to (page 3)

APPENDIX A- JUDGMENT OF THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO WESTERN DIVISION AT DAYTON DATED JULY15, 1998

MARK McCLAIN,

Plaintiff,

-vs-

RICHARD S. SCHARRER, et al.,

Defendant.

District Court for the Southern District of Ohio, Western Division
At Dayton,

July 15, 1998

No. C-3-98-182

Before Magistrate Judge Michael R. Merz

This case is before the Court on Defendant Scharrer's Motion to Dismiss (Doc. #2); Defendant Pickrel, Schaeffer & Ebeling's Motion to Dismiss (Doc. #9), and Plaintiffs Motion for Summary Judgment against all Defendants (Doc. #12). On Defendant Scharrer's Motion to Dismiss, the undersigned filed a Report and Recommendations (Doc.# 5), Mr. McClain filed Objections (Doc #8), and the parties later unanimously consented to plenary magistrate judge jurisdiction under 28 U.S.C. Section 636(c), so that the undersigned considers the Objections rather than having them before a district judge. Although Plaintiff has failed to file a memorandum in opposition to Defendant Pickrel, Schaeffer & Ebeling's ("PS&E") Motion to Dismiss, the Court considers his Motion for Summary Judgment in lieu of such a memorandum.

Appendix A

Plaintiff's Complaint is captioned as a "Professional Negligence Complaint." The gravamen of the Complaint is that Defendant Scharrer as executor of the Estate of Geneva McClain and Attorney James Jacobson at PS&E as attorney for the executor failed to exercise due care in administering the estate, resulting in losses to the Plaintiff.

As the Court noted in the Report and Recommendations, federal courts are courts of limited jurisdiction and only have jurisdiction where it is expressly granted by Congress. Plaintiff acknowledges this, but says this action arises under federal law because it states a claim for relief under 42 U.S.C. Section 1983 for deprivation of property without due process of law.

As also explained in the Report and Recommendations, for a defendant to be liable under Section 1983, that defendant must have been acting under color of state law. The Court cited authority for the proposition that an executor does not act under color of state law. *Hagerty v. Succession of Clement*, 749 F.2d 217 (5t Cir 1984); cert. denied. 474 U.S. 968 (1985). In his Objections and again in his Motion for Summary Judgment, Mr. McClain argues strongly that Mr. Scharrer was a "state actor," but the Hagerty case specifically states that an executor is not a state actor. Obviously, not everyone who acts pursuant to a state statute can be a state actor; otherwise, for example, any driver could be held to be acting under color of state law because he or she exercises a privilege granted by the State. Executors act under the supervision of the Probate Court, but they do not become thereby agents of the court. There is no allegation in the Complaint that Mr. Scharrer was carrying out some unconstitutional policy of the Montgomery County Common Pleas Court so as to make him a State actor. Compare *Flagg Bros. v. Brooks* 436 U.S. 149,157 (1978).

Appendix A

An attorney for an executor is even less like a state actor than the executor. The Supreme Court has even held that a public defender, paid by the State to defend those accused of crime, is not a state actor. *Polk County v. Dodson*, 454 U.S. 312, 102 S.Ct. 445,70 L.Ed.2d 509 (1981). Therefore PS&E cannot be held liable under Section 1983 for the acts Mr. Jacobson as attorney for Mr. Scharrer.

There is another reason why Plaintiff's Complaint fails to state a claim against the Defendants: it alleges that they were negligent. It is established by Supreme Court authority that negligence, even by a state actor, is not sufficient for an action under Section 1983. To put it another way, negligence by a state actor which deprives a person of property does not violate the Fourteenth Amendment and is therefore not actionable under Section 1983. *Daniels v. Williams*, 474 U.S. 327, 106 S.Ct 662,88 L.Ed.2d 662 (1986).

Accordingly, the Court concludes that the Complaint fails to state a claim upon which relief can be granted under federal law and therefore this Court does not have subject matter jurisdiction over the claims made in the Complaint. The Clerk will enter judgment dismissing the Complaint herein as to all Defendant without prejudice for failure to state a claim. Plaintiff's Motion for Summary Judgment is moot.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of the Defendants Richard C. Scharrer and Pickrell, Schaeffer & Ebeling and against the Plaintiff Mark McClain;

and that the Complaint, of the Plaintiff Mark McClain is DISMISSED WITHOUT PREJUDICE for failure to state a claim.

July 15, 1998

s/ Karla S. Evans
Deputy Clerk

APPENDIX B- ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DATED DECEMBER 21, 1998

MARK MCCLAIN,

Plaintiff-Appellant,

v.

RICHARD C. SCHARRER; PICKREL, SCHAEFFER & EBELING,

Defendants-Appellees.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

December 21, 1998

No. 98-4208

Before KENNEDY and BATCHELDER, Circuit Judges; WISEMAN, District Judge.*

This matter is before the court upon consideration of the appellant's response to this court's October 19, 1998 order directing him to show cause why his appeal should not be dismissed for lack of jurisdiction on the basis of a late notice of appeal and on the basis that the notice of appeal did not designate the court to which the appeal was being taken. Appellant responded stating that he appealed the district court's order of October 19, that the appeal should not be dismissed for informality of form Or title, and he argues the merits of his appeal.

Appendix B-1

Counsel for Richard S. Scharrer filed a motion on October 26, 1998 asking the court to dismiss the frivolous appeal on the basis that the notice of appeal was late because it was not filed within 30 days of the decision or within 10 days of the order denying relief from the judgment. Counsel also seeks costs and attorney fees for the preparation of the motion to dismiss.

It appears from the documents before the court that the final judgment of the district court was entered July 15, 1998 Any time-tolling motion was required to be filed within ten days of the entry of the judgment No motion regarding the judgment was entered within that period, the motion for reconsideration filed on September 4, 1998 was late, and the appeal period was not tolled. See Fed. R App. P. 4 (a)(4). Appellant filed a notice of appeal on October 5, 1998 from the judgment

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*The Honorable Thomas A. Wiseman, Jr., United States District Judge for the Middle District of Tennessee, sitting by designation.

filed on June 19, 1998. The notice of appeal was late. See Fed. R. App. P. (a) and 26(a). Moreover, the notice of appeal is defective in that it fails to designate the name of the court to which the appeal is taken as required by Fed. R. App. P.3(c). See *United States v. Webb*, 157 F.3d 451, 453 (6th Cir, 1998) (per curiam).

The failure of appellant to timely file a notice of appeal deprives an appellate court of jurisdiction. Compliance with Fed. R. App P 4 (a) is a mandatory and jurisdictional prerequisite which this court can neither waive nor extend. *Baker v. Raulie*, 879 F.2d 1396, 1398 (6th Cir. 1989) (per curiam). Fed. R. App. P. 26(b) specifically provides that this court may not enlarge the time for filing a notice of appeal.

Accordingly, it is ordered that the appeal is dismissed for lack of jurisdiction. The appellee's motion for attorney fees and costs is denied.

ENTERED BY ORDER OF THE COURT
s/ Leonard Green
Clerk

Copies furnished to:

Honorable Walter H Rice
Mr. Kenneth J. Murphy

Appendix B-2

APPENDIX B- ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DATED FEBRUARY 26, 1999

MARK MCCLAIN,

Plaintiff-Appellant,

v.

RICHARD C. SCHARRER; PICKREL, SCHAEFFER & EBELING,

Defendants-Appellees.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

February 26, 1999

No. 98-4208

Before KENNEDY and BATCHELDER, Circuit Judges; WISEMAN, District Judge.*

Plaintiff-appellant has filed a petition for rehearing of this court's order of December 21, 1998 dismissing his appeal for lack of jurisdiction.

Appendix B-3

Upon careful consideration, this panel concludes that it did not misapprehend or overlook any point of law or fact when it issued its order. Fed. R. App. P.40(a).

The petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT
s/ Leonard Green
Clerk

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*The Honorable Thomas A. Wiseman, Jr., United States District Judge for the Middle District of Tennessee, sitting by designation.

APPENDIX C- DECISION OF THE SUPREME COURT OF OHIO DATED APRIL 1, 1999

THE SUPREME COURT OF OHIO

April 1, 1999

CASE NO. 98-4208

District Court for the Southern District of Ohio, Western Division
At Dayton, No. C-3-98-182

MARK McCLAIN,

Plaintiff-Appellant,

v.

RICHARD C. SCHARRER, et al.,

Defendant-Appellees.

Please be advised that this Court does not have Jurisdiction over United States Courts of Appeals.

s/ Alicia F. DeBoard
Deputy Clerk

Supreme Court, U.S.
FILED
JUN 9 1999
CLERK

(2)

No. 98-1849

In The

Supreme Court of the United States

MARK MCCLAIN,

Petitioner,

v.

RICHARD C. SCHARRER, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

*ANDREW C. STORAR (#0018802)
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2188

QUESTIONS PRESENTED

1. Did the District Court properly dismiss Petitioner's complaint for lack of jurisdiction?

2. Did the District Court properly dismiss Petitioner's complaint after affording Petitioner numerous opportunities to state an actionable claim?

PARTIES TO THE PROCEEDING

The parties to this proceeding are Mark McClain, Richard C. Scharrer, James L. Jacobson and Pickrel, Schaeffer & Ebeling.

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Petitioner,

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Lasky & Scharrer
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James L. Jacobson (#0002031)
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Pickrel, Schaeffer & Ebeling
2700 Kettering Tower
Dayton, Ohio 45423
(937) 223-1130

There are no parent companies or non-wholly owned subsidiaries to any of these entities.

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CITATIONS OF OPINIONS ENTERED IN THIS CASE

In the United States District Court for the Southern District of Ohio,

Western Division at Dayton

McClain v. Scharrer (May 26, 1998) Case No. C-3-98-182, Report and Recommendations, unreported, reprinted at App. 2.

McClain v. Scharrer (Sept. 8, 1998) Case No. C-3-182, Decision and Order Denying Plaintiff's Objections, unreported, reprinted at App. 7.

McClain v. Scharrer (Sept. 17, 1998) Case No. C-3-98-182, Order Denying Second Motion for Relief from Judgment, unreported, reprinted at App. 11.

STATEMENT OF BASIS FOR JURISDICTION

The Decision and Order dismissing this case was entered by the United States District Court for the Southern District of Ohio, Western Division at Dayton, on July 15, 1998. An appeal was then taken out of time to the United States Court of Appeals for the Sixth Circuit on October 5, 1998. On December 21, 1998, the Sixth Circuit Court of Appeals dismissed Petitioner's appeal as untimely. Petitioner filed for a rehearing of the Court's December 21, 1998 order, which was denied by the Sixth Circuit Court of Appeals on February 26, 1999. This

present appeal, filed on April 19, 1999, is timely brought under 28 U.S.C. Section 2101(c).

CONSTITUTIONAL PROVISIONS AND STATUTORY AUTHORITIES INVOLVED

42 U.S.C. Section 1983

U.S. Const., Amendment XIV, Section 1

STATEMENT OF THE CASE

On May 5, 1998, the Plaintiff filed an action entitled "Professional Negligence Complaint" in the United States District Court for the Southern District of Ohio, Western Division at Dayton, alleging that he was an heir of the estate of Geneva D. McClain, and as such, entitled to certain properties which the decedent owned. The decedent had named attorney Richard C. Scharrer as her executor in her will, and Richard C. Scharrer, in return, retained attorney James L. Jacobson, of Pickrel, Schaeffer & Ebeling Co., L.P.A., to assist in the administration of the estate. The properties in which the Plaintiff claimed an interest were ultimately foreclosed, and the impetus for the Plaintiff's suit was the Plaintiff's failure to receive funds from the decedent's estate.

On May 8, 1998, Defendant Scharrer moved to dismiss the Plaintiff's complaint under Fed. R. Civ. P. 12(B). Instead of responding to the merits raised in Scharrer's motion, Petitioner, on May 21, 1998, moved to strike

Scharrer's motion to dismiss. On May 26, 1998, the magistrate judge filed his report and recommendation to overrule Petitioner's motion to strike, and to grant Scharrer's motion to dismiss. Also on May 26, 1998, Petitioner filed an amended motion to strike Defendant Scharrer's motion to dismiss. Thereafter, on June 5, 1998, the Plaintiff filed objections to the magistrate's report while on June 10, 1998, Defendants Pickrel, Schaeffer & Ebeling Co., L.P.A., and James L. Jacobson also moved to dismiss the Petitioner's complaint. Both parties consented to magistrate jurisdiction pursuant to Fed. R. Civ. P. 73(B) and 28 U.S.C. Section 636(c).

Petitioner then filed a motion for summary judgment on June 19, 1998, which the magistrate considered additionally as a memorandum in opposition to Defendants, James L. Jacobson and Pickrel, Schaeffer & Ebeling Co., L.P.A.'s motion to dismiss. On July 15, 1998, the magistrate entered his decision and order dismissing this case without prejudice due to the Petitioner's failure to state a claim upon which relief can be granted. The magistrate observed that the Petitioner's complaint was captioned as a suit for "professional negligence" and that the Plaintiff failed to state a claim for relief under 42 U.S.C. Section 1983 for deprivation of property without due process of law, because none of the Defendants were "state actors." The Court additionally held that negligence by a state actor which deprives a person of property would not constitute a violation of the Fourteenth Amendment, and for that reason as well, would not be actionable under Section 1983. After numerous objections and motions for relief from judgment, the Court reiterated its order of dismissal on September 8, 1998 and September 17, 1998.

Petitioner attempted his appeal to the Sixth Circuit Court of Appeals on October 5, 1998.

ARGUMENT

This case advances none of the criteria identified in Supreme Court Rule 10, and for that reason, as well as the reasons that follow, this Court should deny jurisdiction on the Petition for Certiorari.

1. Did the District Court properly dismiss Petitioner's complaint for lack of jurisdiction?

Contrary to the Petitioner's assertions, there was no directed verdict entered into this case. The District Court, after reviewing Petitioner's complaint for professional negligence, simply noted that the Plaintiff was seeking to recover for property losses allegedly resulting from the negligent administration of the Estate of Geneva McClain. The Court noted that the executor of an estate, while admittedly acting under the supervision of the Probate Court, is nonetheless, not an actor who acts "under color of state law." *Hagerty v. Succession of Clement*, 749 F.2d 217 (5th Cir. 1984), cert. denied, 474 U.S. 968 (1985). Similarly, the Court noted that "an attorney for an executor is even less like a state actor than the executor." *McClain v. Scharrer*, Case No. C-3-98-182, decision and order dismissing case without prejudice, July 15, 1998. Thus, Petitioner's complaint was even more specious as pertains to Respondents, James L. Jacobson and Pickrel, Schaeffer & Ebeling Co., L.P.A., who acted as the attorneys for Executor Scharrer. See, *Polk County v. Dodson*, 454 U.S. 312, 102

S. Ct. 445, 70 L. Ed. 2d 509 (1981). For those reasons, Petitioner's complaint failed to state a claim on which relief could be granted either under the Fourteenth Amendment or 42 U.S.C. Section 1983. Dismissal of the Petitioner's complaint was thus proper.

2. Did the District Court properly dismiss Petitioner's complaint after affording Petitioner numerous opportunities to state an actionable claim?

Petitioner had every conceivable opportunity to present any claims the Petitioner may have had in this litigation. What the Petitioner continues to overlook is that he does not have any claims cognizable under the Fourteenth Amendment or 42 U.S.C. Section 1983. Petitioner has failed to state a claim upon which relief can be granted in the District Court, and has failed to timely appeal the District Court's entry of dismissal to the Sixth Circuit Court of Appeals. As such, Petitioner has failed to preserve any questions for this Court's review other than the untimeliness of the action in the Sixth Circuit Court of Appeals.

As the Sixth Circuit Court of Appeals correctly dismissed Petitioner's appeal, this Court should decline jurisdiction.

CONCLUSION

This Court should decline jurisdiction as this case advances none of the objectives of Supreme Court Rule 10. Petitioner has failed to articulate any legitimate or compelling issues for this Court's review, and simply alleges general dissatisfaction with the results received in the District Court and Court of Appeals, to which no timely appeal was perfected.

Dated: June 9, 1999

Respectfully submitted,

PICKREL, SCHAEFFER and EBELING

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APPENDIX

28 U.S.C. § 1331 Federal question:

> The District courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

42 U.S.C. § 1983 Civil action for deprivation of rights:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State of Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United Sates or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

MARK McCLAIN,

Plaintiff, : Case No. C-3-98-182

-vs- District Judge
Algenon L. Marbley

RICHARD S. SCHARRER, et al., Magistrate Judge
: Michael R. Merz

Defendant.

DECISION AND ORDER DENYING MOTION TO STRIKE; REPORT AND RECOMMENDATIONS

(Filed May 26, 1998)

This case is before the Court on Motion to Dismiss of Defendant Richard S. Scharrer (Doc. #2) and Plaintiff's responsive Motion to Strike (Doc. #4).

Plaintiff brought this action *pro se* to recover for property losses suffered as the result of what he alleges was professional negligence by Defendant Scharrer. Defendant Scharrer seeks dismissal under Fed. R. Civ.P. 12(b)(1) on grounds this Court lacks jurisdiction of the subject matter of this case.

Federal courts are courts of limited jurisdiction; they are empowered to hear only those cases which are within the judicial power of the United States as defined in the United States Constitution and as further granted to them by Act of Congress. Therefore there is a presumption that

a federal court lacks jurisdiction until it has been demonstrated. *Turner v. President, Directors and Co. of the Bank of North America*, 4 U.S. 8, 4 Dall. 8, 1 L. Ed. 718 (1799). Facts supporting subject matter jurisdiction must be affirmatively pleaded by the person seeking to show it. *Bingham v. Cabot*, 3 U.S. 382 (3 Dall. 382), 1 L. Ed. 646 (1798). The burden of proof is on the party asserting jurisdiction if it is challenged. *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 182-83, 56 S. Ct. 780, 80 L. Ed. 1135 (1935). A federal court is further obliged to note lack of subject matter jurisdiction *sua sponte*. *Mansfield, C. & LM. Ry. v. Swan*, 111 U.S. 379, 4 S. Ct. 510, 28 L. Ed. 462 (1884); *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 29 S. Ct. 42, 53 L. Ed. 126 (1908); *Sumner v. Mata*, 449 U.S. 539, 548, n.2, 101 S. Ct. 764, 770, n.2, 66 L. Ed. 2d 722 (1981).

In his Complaint, Plaintiff named several possible bases for jurisdiction, including 28 U.S.C. §1331 (Complaint, Doc. #1, ¶1). Defendant Scharrer attempts to respond to all possible bases; but in his Motion to Strike, Plaintiff makes clear he is relying on federal question jurisdiction under §1331 because he is making his claim under 42 U.S.C. §1983 for deprivation of property without due process of law.

42 U.S.C. § 1983, R.S. § 1979, was adopted as part of the Act of April 20, 1871, and reads, as amended:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the

> Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The statute creates a cause of action sounding essentially in tort on behalf of any person deprived of a constitutional right by someone acting under color of state law. *Memphis Community School District v. Stachura*, 477 U.S. 299 (1986); *Carey v. Piphus*, 435 U.S. 247 (1978). The purpose of §1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails. *Wyatt v. Cole*, 504 U.S. 158 (1992). In order to be granted relief, a plaintiff must establish that the defendant deprived him of a right secured by the U.S. Constitution and the laws of the United States and that the deprivation occurred under color of state law. *See West v. Atkins*, 487 U.S. 42, 48 (1988); *Parratt v. Taylor*, 451 U.S. 527, 535 (1981); *Flagg Brothers Inc. v. Brooks*, 436 U.S. 149, 155 (1978). The principal inquiry in determining whether a private party's actions constitute 'state action' under the Fourteenth Amendment is whether the party's actions may be 'fairly attributable to the state.' See *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). The Supreme Court has set forth three tests to determine whether the challenged conduct may be fairly attributable to the state in order to hold the defendants liable under section 1983. These tests are: (1) the public function test, *West v. Atkins*, 487 U.S. 42, 49-50 (1988); *Flagg Bros. v. Brooks*, 436 U.S. 149, 157 (1978); (2) the state compulsion

test, *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 170 (1970); and (3) the symbiotic relationship or nexus test, *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 721-26 (1961). These tests are reiteated [sic] in *Ellison v. Garbarino*, 48 F. 3d 192, 195 (6th Cir. 1995).

A private person may act under color of state law if he is a willful participant in a joint activity with the State or its agents. *United States v. Price*, 383 U.S. 787, 794 (1966). There must be a sufficiently close nexus between the state and the conduct challenged so that defendant is treated as a state actor and defendant's act is treated that of the state. *See Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982), *quoting Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974); *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937 (1982). But the "[Fourteenth] Amendment erects no shield against merely private conduct, however discriminatory or wrongful." *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 721 (1961), *quoting Shelly v. Kraemer*, 334 U.S. 1, 13 (1948).

Plaintiff's Motion to Strike makes clear that he sues Mr. Scharrer as executor of the estate of Geneva McClain. Although the executor of an estate acts under the supervision of the Probate Court, an executor does not act "under color of state law." *Hagerty v. Succession of Clement*, 749 F. 2d 217 (5th Cir. 1984); *cert. denied*, 474 U.S. 968 (1985). Because Mr. Scharrer, acting as executor, was not acting "under color of state law," however damaging his acts may have been to Plaintiff's property interests, they are not "state action" for which he can be sued under the Fourteenth Amendment and §1983.

Accordingly, Plaintiff's Motion to Strike is DENIED and I recommend that Defendant Scharrer's Motion to Dismiss be GRANTED and the Complaint be dismissed without prejudice for lack of subject matter jurisdiction. Because federal jurisdiction is a difficult matter to learn even for lawyers, I recommend that Mr. Scharrer's motion for sanctions be DENIED.

May 22, 1998.

/s/ Michael R. Merz
Michael R. Merz
United States Magistrate
Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

MARK McCLAIN, Plaintiff(s),	:	Case No. C-3-98-182
-vs-		Magistrate Judge
RICHARD S. SCHARRER, et al.,	:	Michael R. Merz
Defendant(s).	:	

JUDGMENT IN A CIVIL CASE

(Filed Sep. 8, 1998)

JURY VERDICT: This action came before the Court for a trial by jury. The issues have been tried and the Jury has rendered its verdict.

X **DECISION BY COURT:** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the Objection (Doc. #20), of the Plaintiff Mark McClain, construed as a Motion for Relief from Judgment, is DENIED.

Date: September 8, 1998

Kenneth J. Murphy, Clerk
Clerk

By: /s/ Karla S. Evans
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

MARK McCLAIN,

Plaintiff, : Case No. C-3-98-182

-vs- Magistrate Judge Michael R. Merz

RICHARD S. SCHARRER, et al.,

Defendant. :

DECISION AND ORDER DENYING PLAINTIFF'S OBJECTIONS

(Filed Sep. 8, 1998)

This action is before the Court on Plaintiff's Objection (Doc. #20) to the Court's Decision and Order of July 15, 1998, dismissing this case without prejudice (Doc. #14).

Plaintiff, who is proceeding *pro se*, styles his paper an "Objection." Because there was unanimous consent to plenary magistrate judge jurisdiction under 28 U.S.C. §636(c), the objection procedure set forth in Fed. R. Civ. P. 72 is not applicable. Additionally, the Decision and Order objected to were entered July 15, 1998, so that the time for making objections (ten days) has long since passed. However, the courts are obliged to construe *pro se* pleadings liberally, especially in civil rights cases such as this one. Following *Haines v. Kerner*, 404 U.S. 519 (1972), the allegations of a *pro se* complaint are subjected to "less stringent

standards than formal pleadings drafted by lawyers." *Westlake v. Lucas*, 537 F.2d 857 (6th Cir. 1976). Accordingly, the Court will treat Plaintiff's motion as a motion for relief from judgment under Fed. R. Civ. P. 60(b) and consider it on the merits.

Plaintiff's Complaint alleged that Defendant Richard Scharrer as executor of the estate of Geneva McClain and James Jacobson of Defendant Pickrel, Schaeffer & Ebeling as attorney for the estate acted negligently in their professional capacities, thereby depriving Plaintiff of property interests deriving from the estate. Plaintiff brought his action under 42 U.S.C. §1983, claiming that each Defendant was acting under color of state law. While the federal courts have subject matter jurisdiction over §1983 actions under both 28 U.S.C. § 1331 and 1343, a plaintiff must actually allege a §1983 claim before the Court can take jurisdiction of the case. It does not matter that a Plaintiff puts the label "§1983" or "state action" on his case; he must actually allege facts which come within §1983.

In the Decision and Order, the Court held that Plaintiff had not actually asserted a claim under §1983 because (1) executors and attorneys for executors do not act under color of state law, citing *Hagerty v. Succession of Clement*, 749 F.2d 217 (5th Cir. 1984), *cert. denied*, 474 U.S. 968 (1985), and (2) even if Messrs. Scharrer and Jacobson were state actors, Plaintiff only alleges they acted negligently, but §1983 requires something more than negligence, citing *Daniels v. Williams*, 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986).

Mr. McClain's Objections are articulate and contain numerous citations of law. However, none of the cases he cites holds that an executor acts under color of state law or that negligence is sufficient under §1983. It is certainly correct, as he argues, that a person need not be a state officer to have acted under color of state law and that a person may act under color of state law when he or she exercises some delegated power traditionally associated with sovereignty. But acting as executor and the private practice of law in advising an executor are not such delegated powers.

Accordingly, the Objection, construed as a motion for relief from judgment, is DENIED.

September 5, 1998 /s/ Michael R. Merz
Michael R. Merz
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

MARK McCLAIN,

Plaintiff, : Case No. C-3-98-182

-vs- Magistrate Judge

RICHARD S. SCHARRER, et al., : Michael R. Merz

Defendant. :

ORDER DENYING SECOND MOTION FOR RELIEF FROM JUDGMENT

(Filed Sep. 17, 1998)

This case is before the Court on Plaintiff's Motion for Relief from Judgment allegedly under Fed. R. Civ. P. 60(a) (Doc. #23). For the reasons already set out in this Court's Order of September 8, 1998, Plaintiff's Motion for Relief from Judgment is not well taken. The Court continues to adhere to its position that neither of the Defendants acted under color of state law.

Accordingly, the Motion for Relief from Judgment is DENIED.

September 16, 1998. /s/ Michael R. Merz
Michael R. Merz
United States Magistrate Judge